SUPREME COURT, U. S.

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In the Supreme Court of the United States

October Term, 1970

No. 481

WILLIAM BUSH,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the District Court is reported at 296 F. Supp. 368 (S. D. Fla. 1969). The opinion of the Court of Appeals for the Fifth Circuit is reported at 425 F2d 393 (1970).

JURISDICTION

The Petition predicates jurisdiction on 28 USC Sec. 1245 (1), which citation appears to be a printers' transposition of 28 USC 1254 (1). Respondent respectfully submits that this case does not involve the peculiar gravity or general importance, nor present an adequate record, to justify exercise of this Court's power to review by certiorari.

STATEMENT

Respondent in this Brief will answer the questions presented for review by Petitioner as squarely and as briefly circumstances permit. It will be demonstrated that these questions as phrased by Petitioner are not accurate reflections of the issues raised in the Fifth Circuit Court of Appeals, and decided by that Court in its opinion.

Petitioner's statement of the case is generally fair and accurate. Respondent will accordingly limit this restatement to a few additional facts which are required to place the Petition in proper perspective.

The original complaint out of which this Petition arises alleged a cause of action against Respondent, Allstate Insurance Company, for a bad faith refusal to compromise or settle a claim within policy limits when it had an opportunity to do so. The District Court's PreTrial Order specified four particular issues of fact that allegedly constituted bad faith or a course of conduct amounting to bad faith. Failure to make offers of settlement, inadequate investigation, failure to keep the insured fully informed, and mismanagement of the defense are the specific elements of bad faith that were facts to be determined at trial. Petitioner has never contended that he was in any respect restricted by the trial court in the full presentation of his witnesses and evidence.

After a two day trial, involving extensive and conflicting testimony, the District Judge found as a fact that appellant, Allstate, did not have either an offer or an opportunity to settle the case within policy limits. *Bush v. Allstate Ins. Co.*, 296 F. Supp. at 370. Under Florida law, this finding was an outcome-controlling fact in an action of this type.

On appeal to the Fifth Circuit, Petitioner sought to challenge the adequacy of the District Court's findings. This challenge was

posed under the guise of a question of law because the record on appeal did not contain a transcript of the evidence and testimony upon which the judgment sought to be reviewed was based. Although the trial in the lower court lasted two full days numerous witnesses testified, and voluminious records were introduced, the Fifth Circuit was asked to review the lower Court's findings and conclusions in the absence of any record reflecting their basis. In other words, the Fifth Circuit was asked to declare the judgment of the District Court to be clearly erroneous without any knowledge of the testimony and evidence upon which that judgment was based.

REASONS THE WRIT SHOULD NOT BE GRANTED

POINT I

THE PRE-TRIAL ORDER DID NOT PROVIDE FOR A JURY TRIAL AT THE TIME OF TRIAL

This action was removed to the Federal District Court by Respondent on December 12, 1966. Notice of Removal was given Petitioner on this same date. In the state court, prior to removal, there had been no demand for a jury trial. Therefore, Rule 81(c) became applicable regarding trial by jury as of right, and required a demand within 10 days after service of the notice of removal. The last sentence of Rule 81(c) provides as follows:

> "The failure of a party to make a demand as directed constitutes a waiver by him of trial by jury".

Petitioner did not make a demand within the requisite 10 day period. Petitioner did not demand a jury within the 567 days between removal and the pretrial conference, or the 590 days between removal and his motion for jury trial. The waiver was an accomplished, legally operative fact at the time of the

pretrial conference on July 2, 1968. At this point, the parties themselves could not by mutual consent, even with full knowledge of the facts, remove or waive the consequences of the waiver of jury trial. If a jury trial has been waived, a motion is necessary to invoke the court's discretion since the court may not employ Rule 39(b) on its own initiative. *Swofford v. B&W Inc.*, 336 F2d 406, 409 (5th Cir. 1964).

The Petitioner, apparently recognizing the inability of the parties to destroy the waiver, and the need to activate the court's discretion, moved for a jury trial on July 25, 1968. This motion specifically refers to the pre-trial conference record, to the mistaken assumption on which all involved had proceeded, and requests the court to exercise its discretion to grant a jury trial under Rules 38 and 39. It is, therefore, completely unreasonable to argue that the pre-trial record in this cause was never modified, revised or amended to reflect that the trial would be non-jury. This was done in open court, all parties present, and squarely on the issue involved. This became a part of the Pre-Trial Record. At the hearing on motion for new trial, the trial judge stated:

> "THE COURT: When you received notice of trial it was a non-jury trial, and that is when you filed your motion.
>
> MR. FELDMAN: I agree. The problem is that under the Federal Rules the pretrial governs the subsequent court of the action.
>
> THE COURT: Well, that wasn't the final pretrial; that was the preliminary. The course of action would relate to matters concerning the exhibits and stipulations as to the facts and all those things. I don't see how the plaintiff could urge any prejudice because of that comment in terms of having waived something he already had."

Since the final pretrial record, at the time of trial obviously did not provide for a jury, Respondent had no reason or need to seek any formal amendment. However, the notice of civil non-jury trial issued by the Clerk on July 18, 1968 was also a part of the pretrial record. Although issued by the Clerk, this notice of trial was in fact and in legal effect the order of the district judge pursuant to Rule 40 of the Federal Rules of Civil Procedure.

Accordingly, it is an obvious, even an admitted, fact that the pretrial order did not provide for a jury trial at the time of trial. The record plainly shows a separate pretrial hearing on this issue, a careful exercise of judicial discretion by the trial judge, and no facts even suggesting an abuse of discretion. The ruling of the trial judge was strictly in accord with well-settled legal principles involving relief from waiver. See, 5 MOORE'S, Federal Practice, para. 39.09.

POINT II

IT IS NOT AN ABUSE OF JUDICIAL DISCRETION TO REFUSE TO GRANT RELIEF FROM WAIVER OF JURY TRIAL WHERE NO TIMELY DEMAND IS MADE, AND A JURY IS REQUESTED ON THE EVE OF TRIAL ON GROUNDS OF MERE INADVERTENCE.

The jury trial issue presented by Petitioner is brought into sharp perspective by the following facts which bear repeating:

Petitioner's original complaint was filed on November 15, 1966 in the Circuit Court for Broward County, Florida. It contains no demand for a jury trial.

The case was properly removed to the United States District Court for the Southern District of Florida on December 12,

1966. Petitioner thereafter made no demand for a jury trial under the provisions of Rule 81(c) pertaining to jury trial in removed actions.

Respondent's Answer was timely filed, but Petitioner thereafter failed to ask for a jury trial under Rule 38(g).

Approximately 15 months passed, during which period discovery was had and Petitioner's present attorney was substituted as counsel of record. Substituted counsel moved for and was granted a continuance of the pretrial conference in order to conduct necessary discovery and factually and legally prepare his case. No jury trial was sought during this period of approximately a year and a half. Petitioner's first and only demand for a jury trial came in the form of a motion after the case had been pending for 590 days, and after Petitioner's counsel had been granted a continuance to prepare his case.

Under these factual circumstances, the grant or denial of relief from the waiver of jury trial was within the trial court's discretion, and appellate courts normally refuse to interfere with this discretion as exercised. *Englbrock v. Federal Ins. Co.*, 370 F.2d 784 (5th Cir. 1967); *Tri-State Fire Service Co. v. Gates Rubber Co.*, 339 F.2d 573 (5th Cir. 1964); 5 Moore's Fed. Prac., para. 39.09 (p. 715). Petitioner frankly admits in his petition that no jury trial was requested by reason of inadvertence. This same ground was alleged in Petitioner's motion for a jury trial made shortly before the non-jury trial was set to commence. At this point, the last pleading directed to the triable issues had been filed of record for approximately 18 months, and the non-jury trial date had been assigned. Under these conditions the trial court did not abuse its discretion in refusing to grant Petitioner relief from his waiver.

It is settled today that the mere statement of "inadvertence" does not suffice to invoke the discretion of the court to grant relief from such a waiver. 5 Moore's *supra*, at p. 719; *Noonan v.*

Cunard Steamship Co., 375 F2d 69 (2d Cir. 1967). It can be reasonably inferred the trial court exercised its discretion to deny relief from the jury waiver because of the lateness of the demand, its grounding in mere inadvertence, the complexity of the issue, the prejudice to the defendant, and in the interest of expedient resolution of the cause. This ruling was consistent with the legal principle laid down by the Fifth Circuit in *Swofford V. B&W Inc.*, 336 F2d. 406 (5th Cir. 1964). In *Swofford* there was a demand for jury trial coupled with an amended complaint. In *Swofford* the Fifth Circuit acknowledged the broad discretion reposing in the trial judge and affirmed the exercise of discretion under the facts of that case. *Swofford* did not involve the "mere inadvertency" solely alleged by Petitioner herein.

The record in this case is devoid of any evidence even tending to suggest an abuse of discretion. Unlike *AMF Tuboscope, Inc. v. Cunningham*, 352 F2d 150 (10th Cir. 1965), the instant case was at all times on the non-jury trial docket, was never on the jury trial docket by joint stipulation of counsel or otherwise, and was never removed from the jury trial docket. Petitioner received the mode of trial which he elected.

POINT III

THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY INTERPRETED FLORIDA LAW IN HOLDING AN INSURER NOT LIABLE IN EXCESS IN THE ABSENCE OF AN OPPORTUNITY TO SETTLE WITHIN POLICY LIMITS

In this case, contrary to Petitioner's claim, no court at no time has ruled that an insurers bad faith must be predicated on an offer of settlement for the precise amount of the policy

limits. The District Court and the Court of Appeals both held that an insurer could not be guilty of a bad faith refusal to settle in the absence of an *opportunity* to settle the claim within policy limits. (See Opinions below).

The District Judge reached this finding of no offer and opportunity to settle within policy limits in his capacity as trier of the factually conflicting evidence. A contrary finding may have rendered a different rule of Florida law applicable. However, Petitioner does not challenge the facts, nor did Petitioner provide a record on the basis of which The Fifth Circuit Court of Appeals could review the findings of fact. The appropriateness of the application of a particular rule of law cannot be argued until the facts are determined. Once the facts are fixed and have become unreviewable as in this case, the correct rule of law is easy to ascertain and apply.

Granting the facts as found, the correct rule of Florida law is well established in Florida state courts and in Florida cases decided in the Fifth Circuit. The controlling legal principal is clearly set out in *American Fidelity F & Ins. Co. v. Johnson*, 177 So2d 679 (1st D.C.A. Fla. 1965) at p. 681:

> "It is now settled in Florida that a liability insurance carrier which undertakes to defend and in bad faith refused to settle a claim within policy limits, will thereby subject itself to liability for any excess that may be recovered."

This Florida law has been repeatedly applied and affirmed in the Fifth Circuit Court of Appeal as evidenced by *Seward v. State Farm Mut. Auto Ins. Co.*, 392 F2d 723 (5th Cir. 1968) at p. 726:

> "However, in Florida, as in many states, it is well established that an insurer who undertakes to defend

but in bad faith refuses to settle a claim within the policy limits thereby subjects itself to liability for any excess over the policy limits that may be recovered. Dotschay v. National Mutual Ins. Co., 5 Cir. 1957, 246 F. 2d 221, 222; American Fidelity & Casualty Co. v. Greyhound Corp., 5 Cir. 1956, 232 F.2d 89, 93; Tully v. Travelers Ins. Co. N.D. Fla 1954, 118 F. Supp. 568, 569; American Fidelity Firs Ins. Co. v. Johnson, supra at 681; American Fire & Casualty Co. of Greenville v Davis, Fla. App. 1962, 146 So2d 615, 167; Canal Ins. Co. of Greenville v. Sturgis, Fla. App. 1959, 114 So.2d 469; 115 So. 2d 774, Fla. 1960, 122 So.2d 313; Auto Mutual Indemnity Co. v. Shaw, 1938, 134 Fla. 815, 184 So. 852, 859."

In the absence of both an offer and an opportunity to settle within policy limits, it is obvious that Respondent could not be guilty of a bad faith refusal to settle within policy limits, and that the District Court and the Court of Appeal applied the correct rule of Florida law.

CONCLUSION

As the decisions below are clearly correct, and involve no conflict of decisions, or substantial question of federal law, Respondent respectfully submits that this petition for writ of certiorari should be denied.

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT

Respondent's brief has come before this Honorable Court and has, we are afraid, confused rather than clarified the issues.

Frequent references are made to the

lack of a transcript of evidence and testimony; and that Petitioner under the guise of a question of law sought to have the Court of Appeals declare the District Court's judgment clearly erroneous. (Respondent's brief p. 3).

Petitioner has twice filed motions to proceed in forma pauperis which were denied by the District Court and the Court of Appeals. Lacking the funds for a transcript, Petitioner has only raised and sought to have reviewed questions of law. It is respectfully submitted that said issues can be decided with the present record. It is to factual issues that the "clearly erroneous" doctrine applies and thus, Petitioner has not nor does he now seek to show that the decision of the lower court was clearly erroneous, but rather that it was wrong as a matter of law.

ARGUMENT

THERE WAS ONLY ONE PRETRIAL CONFERENCE RESULTING IN ONE PRETRIAL ORDER PURSUANT TO RULE 16 AND THE COURT ERRED IN NOT FOLLOWING ITS OWN PRE-TRIAL ORDER.

Respondent in Point One has expended much effort to try and establish more than one pretrial conference and more than one pretrial order. The record does not support this contention nor does the list of docket entries.

Mar. 14	Order for pretrial conference Mon., 5/27/68 at 4:00 P.M. Judge Atkins.
June 14	Amended Order granting Motion for Continuance and setting Pre-Trial Conference (1) Pre-Trial Conference is set for July 2, 1968 at 4:30 P.M., and Pre-Trial Stipulation entered into by parties must be filed June 24, 1968.(c/13/68/CCA)
June 24	Pre-Trial Stipulation, filed by Plaintiff & Defendant.
July 19	CIVIL NON JURY TRIAL. Sept. 16, 1968 10:00 CA
Sept.19	TRIAL BY THE COURT WITHOUT A JURY-Proceedings on trial.
Oct. 4	Non-jury trial resumed and concluded. Special Findings-of-fact and Conclusion of Law to enter(CCA) (Docket entries attached hereto as Appendix C)